

No. 12,115

IN THE

United States Court of Appeals
For the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and
GENERAL ENGINEERING AND DRYDOCK
CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Com-
missioner for the Thirteenth Com-
pensation District of the Bureau of
Employees' Compensation, Federal
Security Agency, and HENRY MAN-
EKE and MOLLIE MANEKE, Parents of
Adrian Maneke, Deceased,

Appellees.

Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

THE EVIDENCE RELIED UPON BY APPELLEE PILLSBURY TO SUPPORT HIS ORDER FAILS TO SHOW DEPENDENCY AS OF THE TIME OF THE INJURY.

After summarizing the evidence which appellee contends supports the finding of facts made by the deputy commissioner, his brief contains the following statement: "It is respectfully submitted that the testimony referred to above supports the deputy commissioner's finding that the mother and father were dependent upon this deceased employee." (Brief for Appellee Deputy Commissioner Pillsbury, page 13.) The evidence summarized in the brief does show dependency, but it establishes dependency as of the time the deceased employee was living and working in Kansas City, Missouri, and not dependency "as of the time of the injury" as required by the statute. The argument advanced by appellee ignores, for the purpose of determining the question of dependency, the significant fact that six months before he sustained his fatal injury the employee quit his job and his place of abode in Kansas City, Missouri, removed to California, and changed completely the relationship existing between himself and his father and mother, although for the purpose of determining all other facts which are required by the statute to be determined upon conditions as they existed at the time of the injury the deputy commissioner gave recognition to the fact that as of the time of injury the deceased employee was working at Oakland, California, and not at Kansas City, Missouri.

Under Section 3 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 903), compensation is payable "only if the disability or death results from an injury occurring upon the navigable waters of the United States". For the purpose of determining that he had jurisdiction over the claim presented in this case, the deputy commissioner gave recognition to the fact that at the time he sustained his fatal injury Adrian Maneke was working on a vessel afloat on navigable waters at Alameda, California, and not in a factory in the inland city of Kansas City, Missouri. Again, Section 10 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 910) requires that the computation of compensation shall be based upon the wages of the injured employee "at the time of the injury". For the purpose of determining the average wages of the deceased employee in this case, the deputy commissioner took into consideration the wages paid to him by the General Engineering and Drydock Corporation, his employer at Alameda, California, and not the wages which he had previously earned in his employment at Kansas City, Missouri. We submit that there is neither legal nor logical basis for determining all other points strictly in accordance with conditions as they existed at the time of injury, but ignoring conditions as they existed at that time for the purpose of determining the question of dependency.

Appellants do not assert that it is necessary to establish that a contribution was made on the very day of injury in order to show dependency, or that

there are not many cases in which it is entirely proper to consider contributions made before the injury for the purpose of determining the extent of the dependency existing as of the time of the injury. Where contributions have been made by an employee to persons partially dependent upon him for support over a period of time *and there has been no substantial change in the nature of the arrangement between them prior to the date of injury*, it is proper to consider contributions made prior to the time of injury for the purpose of determining the *rate of contribution* at the time of injury. But where there has been a substantial change in the arrangement between the parties, we submit that consideration can be given only to contributions made after the date that change took place. In this case, the change in relationship took place in early January, 1947, when Adrian Maneke left Missouri for California, and evidence of contributions made prior to that date do not support the finding of the deputy commissioner that dependency existed as of the time of the injury.

II.

THE CASES CITED BY APPELLEE ARISING UNDER STATE COMPENSATION LAWS ARE DISTINGUISHABLE FROM THE INSTANT CASE.

Appellee cites, on pages 21-27 of his brief, a number of state decisions in support of his contentions. As has been pointed out by this and other Circuit Courts (*Kobilkin v. Pillsbury*, 103 F. (2d) 667; *Stansfield v.*

Lykes Bros. S.S. Co., 124 F. (2d) 999) decisions of state Courts are often of little value in determining questions arising under the Longshoremen's and Harbor Workers' Compensation Act because they necessarily turn upon the wording of specific statutes which may not be analogous to the provisions of the federal act. To the extent that the authorities cited by appellee are based upon state statutory provisions similar to those found in the federal act, they are distinguishable on the facts. The cases cited are principally cases in which the basic relationship between the deceased employee and the persons claiming dependency upon him remained in *status quo*, but because of illness, slack work, or other cause beyond the control of the employee, there had been a purely temporary suspension of contributions. For example, appellee quotes at length on page 25 of his brief from the Illinois case of *LaSalle County Carbon Coal Company v. Industrial Comm.*, 356 Ill. 421, 190 N.E. 687. As we have pointed out in our opening brief (pages 9-11), on a factual situation similar to the one presented in this case the Illinois Court, in *Robert Gair Company v. Industrial Comm.*, 340 Ill. 99, 172 N.E. 46, the Illinois Court decided the precise point here involved in accordance with the contentions urged by appellants in this case.

CONCLUSION.

It is respectfully submitted that the finding of the deputy commissioner that the claimants were depend-

ent upon the deceased employee as of the time of the injury is not in accordance with law, and that the order of the Court below dismissing the complaint for injunction, should be reversed.

Dated, San Francisco, California,
April 4, 1949.

Respectfully submitted,

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